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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Robert H. Bork,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-169

PETER THOMAS MESSINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner alleges that accomplice testimony alone should not have been held sufficient to support his conviction and that the count on which he was convicted did not state an offense.

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to sell plates for making counterfeit money, in violation of 18 U.S.C. 474.[1] He was sentenced to three years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A1-A8).

The evidence showed that petitioner's brother, John Messina, was arrested after attempting to sell aluminum

[1] Petitioner was acquitted of two other counts charging the possession of a plate from which a counterfeit obligation had been printed (18 U.S.C. 474) and possession of a counterfeit bill (18 U.S.C. 472).

photo-engraved plates for counterfeiting ten dollar bills to a Secret Service undercover agent. While initially claiming that he had found the plates, John later agreed to cooperate with the authorities and related that he had in fact gotten the plates from his brother, Peter, the petitioner (Tr. 134-140). At trial, John Messina disclosed a series of meetings with his brother after the latter had solicited his assistance in selling counterfeit ten dollar bills. At one of these meetings, petitioner displayed a sample counterfeit bill. Later, petitioner informed John that it was impossible to obtain further bills, but that he wanted to sell some counterfeit plates to which he had access. John Messina then established contact with an individual working (unbeknown to him) as a government informant, who introduced him to the Secret Service undercover agent, with whom he agreed to a sale price of $35,000. John then arranged to pick up the plates from petitioner—agreeing to call him after the transaction was completed—and delivered them to the agent. He was arrested shortly thereafter (Tr. 70-86).

The testimony of two Secret Service agents confirmed that of petitioner's brother. One testified that John Messina had referred to an accomplice, but not by name (Tr. 184). The other testified that when petitioner and his brother were being taken from the New York City Secret Service Headquarters to the Federal House of Detention, John Messina stated to petitioner, "Pete, we have to cooperate, we have no choice. They caught me redhanded with the plates," whereupon petitioner replied "You are the one that got caught. Why did you get me involved? You should take your own

medicine. You know what happens to stool pigeons" (Tr. 221).[2]

Petitioner testified and generally denied his brother's allegations, claiming the latter bore an enmity toward him. However, while mentioning records that allegedly would exonerate him, he stated that he had not sought to verify them or to bring them into court (Tr. 245-247; 257-257A).

1. Petitioner argues that this Court's decision in *In re Winship*, 397 U.S. 358, holding that criminal convictions must be based on proof beyond a reasonable doubt, precludes a finding of guilt based upon the uncorroborated testimony of an accomplice. To begin with, here there was corroboration in petitioner's inculpatory statements overheard by the Secret Service agent, the testimony of the Secret Service agent that John Messina had referred to an accomplice, and petitioner's failure to produce records which he claimed would be exculpatory.

In any event, *In re Winship* did not overrule *Caminetti* v. *United States*, 242 U.S. 470, in which the Court refused to elevate to a constitutional requirement instructions on the weight to be given accomplice testimony. See also *United States* v. *Ferrara*, 458 F. 2d 868 (C.A. 2); *United States* v. *Stanley*, 433 F. 2d 637 (C.A. 5); *United States* v. *Brooks*, 422 F. 2d 367 (C.A. 9); *United States* v. *Miceli*, 445 F. 2d 256 (C.A. 1); *United States* v. *Cole*, 449 F. 2d 194 (C.A. 8); *United States* v. *Fraley*, 451 F. 2d 1307 (C.A. 9). While petitioner argues that

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[2] Although the contrary is suggested by petitioner, we note that there is nothing in the record to suggest that this was anything but a spontaneous conversation between petitioner and his brother, in spite of the latter's having, by then, agreed to cooperate with the authorities.

Winship constitutes a disavowal of *Caminetti*, the Court noted in *Winship*, though not referring directly to *Caminetti*, that the *Winship* holding was merely a reiteration of a consistent line of holdings by the Court which long predated *Caminetti*. *Winship*, *supra*, 397 U.S. at 362. The two cases are clearly not in conflict.[3]

Moreover, the jury in the present case was instructed that it could convict only on a finding of guilt beyond a reasonable doubt (Tr. 347), and that pursuant to this requirement the testimony of all witnesses should be carefully scrutinized (Tr. 355). The judge then specifically cautioned the jury to weigh the accomplice's testimony "with great care and caution" and noted that guilt

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[3] We take issue with petitioner's suggestion (Pet. 12-13) that *Caminetti* was not intended to stand for the proposition that guilt may rest upon the uncorroborated testimony of an accomplice. This Court's complete statement on that issue, only partly reproduced in the petition, is as follows (242 U.S. at 495):

> It is urged as a further ground of reversal of the judgments below that the trial court did not instruct the jury that the testimony of the two girls was that of accomplices, and to be received with great caution and believed only when corroborated by other testimony adduced in the case. We agree with the Circuit Court of Appeals that the requests in the form made should not have been given. In *Holmgren* v. *United States*, 217 U.S. 509, this court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony before giving credence to such evidence. *While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them.* * * * [Emphasis added.]

We also challenge petitioner's statement that all lower court cases in which the *Caminetti* rule has been invoked have involved situations wherein other independent evidence was also introduced. See *Stanley*, *supra*; *Miceli*, *supra*.

could be based only upon their concluding that the accomplice was "[T]elling the truth beyond a reasonable doubt" (Tr. 357).

2. Petitioner's final contention—that the indictment brought against him was defective as not stating an offense—is adequately answered in the opinion of the court below (Pet. App. A6-A7), on which we rely.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.